

BRAUNS AFFIDAVIT

EXHIBIT A



April 10, 2007

Certified Mail, Return Receipt Requested and Regular Mail

Forthright Construction, Inc.
2240 McDonald Avenue
Brooklyn, New York 11223

Re:	Insured:	Forthright Construction, Inc.
	Claimants:	Vasilis and Constantia Aftousmis
	Claim No.:	0136NY041376
	Policy:	L036000522 (11/24/03 – 11/24/04) L036001127 (11/24/04 – 11/24/05) L036001737 (11/24/05 – 11/24/06)

Dear Sir/Madam:

American Claims Service is an authorized representative for Atlantic Casualty Insurance Company ("Atlantic Casualty") with respect to this matter.

Please accept this letter as Atlantic Casualty's statement of its position that, for the reasons set forth herein, **there is no coverage for and it denies any coverage obligation** under the above-referenced insurance contracts with respect to the action entitled *Vasilis Aftousmis and Constantia Aftousmis v. Wonder Works Construction Corp. and Forthright Construction, Inc.*, Index No. 102479/07, Supreme Court of the State of New York, County of New York, filed on February 22, 2007 (the "Aftousmis Action").

Based on our investigation to date, Atlantic Casualty was not provided with timely written notice of occurrence, claim and suit; there was a failure to provide documents to Atlantic Casualty and there was a failure to cooperate with Atlantic Casualty with respect to this claim. In addition, the independent contractors / subsidence / subcontractors exclusions and the claims in process exclusion bar coverage for this claim, and the claim arises out of work performed at the project that was not within the business description as classified on the Atlantic Casualty insurance contracts. Forthright Construction, Inc. ("Forthright") has not responded to the complaint in the *Aftousmis Action* to date, will likely default in the action, and has failed to cooperate in its defense of this claim. Accordingly, solely to protect Atlantic Casualty's and Forthright's interests in the event of Forthright's potential default, Atlantic Casualty will provide a **courtesy interim defense** to Forthright in the *Aftousmis Action*. In so doing, however, Atlantic Casualty does not

waive, but rather expressly preserves, all of its rights under the above-referenced insurance contracts and its denial of coverage for this claim.

The Allegations Of The *Aftousmis* Action

We understand that the allegations of the *Aftousmis Action* are unsubstantiated and, by addressing coverage issues herein, we do not mean to suggest that there is any merit to those claims.

The plaintiffs/claimants are Vasilis and Constantia Aftousmis. The defendants are Forthright Construction, Inc. and Wonder Works Construction Corp. ("Wonder Works"). On February 22, 2007, the claimants filed the *Aftousmis Action* against Forthright and Wonder Works as a result of alleged damage to plaintiffs' building. The *Aftousmis Action* alleges that the plaintiffs owned the premises located at 97 Quentin Road, Brooklyn, New York. It further alleges that Wonder Works was the construction manager and supervisor for a building adjoining the plaintiffs' premises. The excavation work for the building was allegedly done at a depth of "more than ten feet below the street line of 97 Quentin Road, Brooklyn, New York". (¶8) Moreover, the *Aftousmis Action* alleges that Wonder Works "wrongfully neglected to request permission to excavate" the soil beneath the plaintiffs' premises and failed to notify the plaintiffs of the excavation near to and underneath their premises. (¶10)

In addition, the *Aftousmis Action* alleges that Wonder Works wrongfully neglected to provide proper foundations to protect plaintiffs' walls and premises and ensure that they would be safe once excavation commenced. As a result of Wonder Works' negligence, the complaint alleges, the excavation caused cracks to develop in the walls and cement floor of the plaintiffs' premises. The complaint also alleges that Wonder Works' negligent supervision of the construction of the building caused debris to become lodged in the drains on the roof of plaintiffs' building, causing severe damage. The complaint alleges that Wonder Works breached its duty to properly oversee the excavation and construction of the project.

Further, the *Aftousmis Action* alleges that Forthright was the general contractor for the construction of the building adjacent to the plaintiffs' premises. The complaint goes on to make same allegations against Forthright that are alleged against Wonder Works. Finally, the complaint seeks \$10,000,000.00 in damages.

The Atlantic Casualty Insurance Contracts

Atlantic Casualty Insurance Company issued to Forthright Construction, Inc. of 2240 McDonald Avenue, Brooklyn, New York 11223, insurance contracts numbered L036000522, with a policy period of 11/24/03 – 11/24/04; L036001127, with a policy period of 11/24/04 – 11/24/05; and L036001737, with a policy period of 11/24/05 – 11/24/06 (the "Atlantic Casualty insurance contracts"). Each policy contains a limit of liability of \$1,000,000 per occurrence and \$2,000,000 aggregate.

SECTION III - LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will

pay regardless of the number of:

- a. Insureds;
- b. Claims made or "suits" brought; or
- c. Persons or organizations making claims or bringing "suits".

2. **The General Aggregate Limit** is the most we will pay for the sum of:

- a. Medical expenses under Coverage C;
- b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and
- c. Damages under Coverage B.

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

4. Subject to 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal injury" and all "advertising injury" sustained by any one person or organization.

5. Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

- a. Damages under Coverage A; and
- b. Medical expenses under Coverage C

because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. Subject to 5. above, the Fire Damage Limit is the

most we will pay under Coverage A for damages because of "property damage" to premises, while rented to you or temporarily occupied by you with permission of the owner, arising out of any one fire.

7. Subject to 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

For your convenience, we quote certain portions of the Atlantic Casualty insurance contracts (without waiving Atlantic Casualty's right to rely on any other provision, each of which remains in full force and effect):

SECTION I COVERAGES**COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY****1. Insuring Agreement**

a. *We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:*

- (1) *The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and*
- (2) *Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.*

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments Coverages A and B.

b. *This insurance applies to "bodily injury" and "property damage" only if:*

- (1) *The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";*
- (2) *The "bodily injury" or "property damage" occurs during the policy period; and*

2. Exclusions

This insurance does not apply to:

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) *That the insured would have in the absence of the contract or agreement; or*
- (2) *Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract".*

reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

- (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
- (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

j. ***Damage To Property***

"Property damage" to:

- (1) *Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;*
- (2) *Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;*
- (3) *Property loaned to you;*
- (4) *Personal property in the care, custody or control of the insured;*
- (5) *That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or*
- (6) *That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.*

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

SECTION IV COMMERCIAL GENERAL LIABILITY CONDITIONS

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. *You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:*

- (1) *How, when and where the "occurrence" or offense took place;*
- (2) *The names and addresses of any injured persons and witnesses; and*
- (3) *The nature and location of any injury or damage arising out of the "occurrence" or offense.*

b. If a claim is made or "suit" is brought against any insured, you must:

- (1) *Immediately record the specifics of the claim or "suit" and the date received; and*
- (2) *Notify us as soon as practicable.*

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

- (1) *Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";*
- (2) *Authorize us to obtain records and other information;*
- (3) *Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and*
- (4) *Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.*

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

- (1) *Any of the other insurance, whether primary, excess, contingent or on any other basis:*
 - (a) *That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";*
 - (b) *That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;*
 - (c) *That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or*
 - (d) *If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I Coverage A Bodily Injury And Property Damage Liability.*
- (2) *Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.*

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) *The total amount that all such other insurance would pay for the loss in the absence of this insurance; and*
- (2) *The total of all deductible and self-insured amounts under all that other insurance.*

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer

contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;*
- b. Those statements are based upon representations you made to us; and*
- c. We have issued this policy in reliance upon your representations.*

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and*
- b. Separately to each insured against whom claim is made or "suit" is brought.*

* * *

SECTION V DEFINITIONS

- 8. *"Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:*
 - a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or*
 - b. You have failed to fulfill the terms of a contract or agreement; if such property can be restored to use by:*
 - a. The repair, replacement, adjustment or removal of "your product" or "your work"; or*
 - b. Your fulfilling the terms of the contract or agreement.*
- 9. *"Insured contract" means:*
 - a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";*
 - b. A sidetrack agreement;*

- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. *Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:*

- (1) *Products that are still in your physical possession; or*
- (2) *Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:*
 - (a) *When all of the work called for in your contract has been completed.*
 - (b) *When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.*
 - (c) *When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.*

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. *Does not include "bodily injury" or "property damage" arising out of:*

- (1) *The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;*
- (2) *The existence of tools, uninstalled equipment or abandoned or unused materials; or*
- (3) *Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.*

17. *"Property damage" means:*

- a. *Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or*
- b. *Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.*

21. *"Your product":*

a. *Means:*

- (1) *Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:*
 - (a) *You;*
 - (b) *Others trading under your name; or*
 - (c) *A person or organization whose business or assets you have acquired; and*
- (2) *Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.*

b. *Includes:*

- (1) *Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and*
- (2) *The providing of or failure to provide warnings or instructions.*

c. *Does not include vending machines or other property rented to or located for the use of others but not sold.*

22. *"Your work":*

a. *Means:*

- (1) *Work or operations performed by you or on your behalf; and*
- (2) *Materials, parts or equipment furnished in connection with such work or operations.*

b. *Includes:*

- (1) *Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and*
- (2) *The providing of or failure to provide warnings or instructions.*

* * *

EXCLUSIONS/LIMITATIONS - COMBINATION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

* * *

EXCLUSION – PUNITIVE DAMAGES

We do not cover any claim of or indemnification for punitive or exemplary damages. If a "suit" seeking both compensatory and punitive damages has been brought against you for a claim covered by this policy, we will provide defense for such action. We will not have any obligation to pay for any costs, interest or damage attributable to punitive or exemplary damages.

EXCLUSION – INDEPENDENT CONTRACTORS/SUBCONTRACTORS

You or any insured are not covered for claims, loss, costs or expense arising out of the actions of independent contractors/subcontractors for or on behalf of any insured.

EXCLUSION – SUBSIDENCE

In consideration of the premium charged, it is hereby understood and agreed that liability for bodily injury or property damage caused by, resulting from, attributable to or contributed to, or aggravated by the subsidence of land as a result of landslide, mud flow, earth sinking or shifting, resulting from operations of the Named Insured or any other subcontractor of the Named Insured is excluded.

EXCLUSION – ASSAULT AND/OR BATTERY

1. This insurance does not apply to and we have no duty to defend any claims or "suits" for "bodily injury" "property damage" or "personal and advertising injury" arising in whole or in part out of: ...

3. *Exclusion 2.a. of the Commercial General Liability Coverage Form is deleted in its entirety and replaced by the following:*
 - a) "bodily injury" or "property damage" expected or intended from the standpoint of any insured.

EXCLUSION – CLAIMS IN PROCESS

Paragraphs b. (3), c. and d. under Insuring Agreement of Section I – Coverage A – Bodily Injury and Property Damage Liability, are deleted. The following is added to 2. Exclusions under Section I – Coverage A – Bodily Injury and Property Damage Liability:

1. *any loss or claim for damages arising out of or related to "bodily injury" or "property damage", whether known or unknown:*
 - a. *which first occurred prior to the inception date of this policy; or*

- b. which is, or is alleged to be, in the process of occurring as of the inception date of this policy.
- 2. any loss or claim for damages arising out of or related to "bodily injury" or "property damage", whether known or unknown, which is in the process of settlement, adjustment or "suit" as of the inception date of this policy.

We shall have no duty to defend any insured against any loss, claim, "suit" or other proceeding alleging damages arising out of or related to "bodily injury" or "property damage" to which this endorsement applies.

* * *

EXCLUSION – MOLD, BACTERIA, VIRUS AND ORGANIC PATHOGEN LIABILITY

The following supercedes the terms and conditions of this policy. This insurance does not apply.

- 1. to any alleged "bodily injury", "property damage", "personal injury" or "advertising injury";
- 2. to any alleged damages for devaluation of property or for the taking, use or acquisition or interference with the rights of others in property or in air space;
- 3. to any loss, cost or expense, including but not limited to fines, penalties and attorney fees, arising out of any governmental direction or request, or any private party or citizen action, that an insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize "organic pathogens" or;
- 4. to any litigation or administration procedure in which an insured may be involved as a party;

arising directly, indirectly, or in concurrence or in any sequence out of actual, alleged or threatened existence, exposure to, discharge, dispersal, release or escape of "organic pathogens", whether or not such actual, alleged or threatened existence, discharge, dispersal, release or escape is sudden, accidental or gradual in nature.

In addition, this insurance does not apply to any alleged "bodily injury", "property damage", "personal injury" or "advertising injury", loss, cost or expense including but not limited to fines, penalties and attorney fees, arising out of or related to any form of "organic pathogens", whether or not such actual, alleged or threatened existence, exposure to, discharge, dispersal, release or escape is negligently or in intentionally caused by any person or entity and whether or not the liability of any insured is alleged to be direct or vicarious. This exclusion also applies whether or not such injury, damage, devaluation, cost or expense is expected or intended from the standpoint of any insured.

"Organic pathogen" means any organic irritant or contaminant, including but not limited to mold, fungus, bacteria or virus, including but not limited to their byproducts such as mycotoxin, mildew, or biogenic aerosol.

"Waste" means any property intended to be disposed, recycled, reused or reclaimed by the owner or user thereof.¹

All other terms and conditions remain unchanged.

LIMITATION - DUTY TO DEFEND

Where there is no coverage under this policy, there is no duty to defend any insured.

TOTAL POLLUTION EXCLUSION ENDORSEMENT

Exclusion f. under paragraph 2., Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability is replaced by the following:

This insurance does not apply to.

f. Pollution

- (1) *"Bodily injury" or "property damage" which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.*
- (2) *Any loss, cost or expense arising out of any:
 - (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
 - (b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".*

The Definition of "Pollutants" in Section V - Definitions is deleted and replaced by the following:

"Pollutants" means solid, liquid, gaseous, or thermal irritant or contaminant or all material for which a Material Safety Data Sheet is required pursuant to federal, state or local laws, where ever discharged, dispersed, seeping, migrating or released, including onto or into the air or any air supply, water or any water supply or land, including but not limited to petroleum, oil, heating oil, gasoline, fuel oil, carbon monoxide, industrial waste, acid, alkalis, chemicals, waste, sewage; and associated smoke, vapor, soot and

¹ This paragraph was removed from the endorsement in the 2005-2006 policy only.

fumes from said substance. Waste includes material to be recycled, reconditioned, or reclaimed.²

* * *

Atlantic Casualty insurance contract number L036001737 (11/24/05-06)) also contains the following provisions:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CLASSIFICATION LIMITATION

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to and no duty to defend is provided for "bodily injury", "property damage", "personal and advertising injury" or medical payments for operations which are not classified or shown on the Commercial General Liability Coverage Declarations, its endorsements or supplements.

* * *

Atlantic Casualty insurance contracts numbered L036000522 (11/24/03-04), L036081127 (11/24/04-05) and L036001737 (11/25/05-06) contain the following provisions:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SUBCONTRACTORS – DEFINITION OF ADEQUATELY INSURED

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

The classifications used in this policy containing the words "Contractors – Subcontracted Work" apply to that portion of the operations performed for the insured by "adequately insured" subcontractors.

This insurance does not apply to any claim arising from subcontracted work unless:

1. *The subcontractor maintains insurance in force for his operations with at least the following Limits of Liability:*

<i>A.</i>	<i>General Aggregate Limit</i>	
	<i>(Other than Products –Completed Operations)</i>	<i>\$1,000,000</i>
	<i>Products-Completed Operations Aggregate Limit</i>	<i>\$1,000,000</i>
	<i>Each Occurrence Limit</i>	<i>\$1,000,000</i>

2. *B. Or the limits provided by this policy, whichever are less; and*

² This paragraph is only contained in the Total Pollution Exclusion Endorsement in the 2005-2006 policy.

2. *You maintain a current certificate of insurance for the subcontractor; and*
3. *A hold harmless agreement in favor of you has been executed with the subcontractor; and/or*
4. *You are endorsed to the subcontractors Commercial General Liability policy as an additional insured.*

*If all of the above conditions are met, the subcontractor will be considered "adequately insured" and exclusion **AGL-005** Exclusion-Independent Contractors/Subcontractors shown on the Exclusions/Limitations-Combination Endorsement attached to this policy is deleted in its entirety.*

All other terms and conditions remain unchanged.

* * *

Atlantic Casualty's Denial Of Coverage

Atlantic Casualty denies any coverage obligation with respect to the *Aftousmis Action* based on all of the terms of the insurance contract. It will, however, provide a courtesy interim defense to Forthright Construction, Inc., subject to the following:

Atlantic Casualty denies coverage to for the *Aftousmis Action* on the grounds and to the extent that there has been a breach of the conditions precedent to coverage in the Atlantic Casualty insurance contracts, including the failure to provide timely written notice of occurrence, claim and suit, immediately forward documents, cooperate, and not make voluntary payments or admit any liability. Atlantic Casualty does not provide coverage where there has been a failure to comply with the insurance contracts' notice and other conditions.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that the Exclusion – Independent Contractors/Subcontractors applies.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that the Exclusion – Subsidence applies.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that the Exclusion – Expected or intended from the standpoint of the insured applies.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that the *Aftousmis Action* does not allege "property damage" arising out of work that was within the business description as classified or shown on the Atlantic Casualty insurance contracts and/or on the grounds that the Classification Limitation endorsement in the Atlantic Casualty insurance contracts applies.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that the Exclusion – Claims In Process applies.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that there was any misrepresentation, misstatement, omission, and/or failure to disclose during the procurement of the Atlantic Casualty insurance contracts.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that the *Aftousmis Action* does not assert a claim for “property damage” ... caused by an ‘occurrence’” within the meaning of the Atlantic Casualty insurance contracts. There is no coverage for injury or damage that is not caused by an “occurrence”.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that the Atlantic Casualty insurance contracts are not triggered by this claim and to the extent that there is no covered “property damage” during the Atlantic Casualty insurance contracts’ policy periods. The Atlantic Casualty insurance contracts’ policy periods are 11/24/03-04, 11/24/04-05, and 11/24/05-06. No injury or damage outside those periods is covered by Atlantic Casualty.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that any of the exclusions apply to this loss.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that exclusions j, k, l, m, and/or n applies.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that the total pollution exclusion applies.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that the “Mold, Fungus, Bacteria, Virus And Organic Pathogen Exclusion – Liability” applies.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that anyone seeks coverage for an award of punitive damages. Such damages are barred from coverage based on the Exclusion – Punitive Damages and New York law.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that anyone has, for any losses allegedly covered by the Atlantic Casualty insurance contracts, co-insurance, other insurance, self-insurance, deductibles, retentions, collateral sources of money, or other contractual indemnitors or to the extent the Atlantic Casualty insurance contracts provide limited or no insurance based on an allocation or to the extent that the Atlantic Casualty insurance contracts constitute excess insurance.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that the *Aftousmis Action* does not seek sums you are legally obligated to pay as damages within the meaning of the Atlantic Casualty insurance contracts.

Atlantic Casualty denies coverage for the *Aftousmis Action* on the grounds and to the extent that any deductible or retention applies or any award exceeds the limits of the Atlantic Casualty insurance contracts.

Should the total amount of this claim exceed \$1,000,000, you could be responsible for payment in excess of those limits. If you have any other insurance coverage that may apply to this loss

you will need to make sure that company has notice of this suit. At this time, we do not know the total amount of claims to be presented. You have the right to consult an attorney at your own expense to protect your personal interest. This letter is to put you on notice of this potential legal exposure.

This letter is based on the information supplied to Atlantic Casualty as of this date. It is not, and should not be construed as, a waiver or estoppel of Atlantic Casualty's rights or any of the terms, conditions, and exclusions of the captioned Atlantic Casualty insurance contracts, which remain in full force and effect. Atlantic Casualty expressly reserves the right to assert any defenses determined to exist from orders, facts, pleadings, discovery, investigation or other disclosure.

American Claim Service has assigned the defense of this matter to the law firm of:

Wade, Clark, Mulcahy
111 Broadway
New York, NY 10006
Phone: 212 267 1900

We ask that you cooperate fully with defense counsel through out the proceedings. You may wish to contact the defense firm and provide them with any information they may need to contact you.

Should you wish to take this matter up with the New York State Insurance Department, you may write or visit the Consumer Credit Services Bureau, New York State Insurance Department at 160 West Broadway (19th Floor), New York, New York 10013; Agency Building One, Nelson A. Rockefeller Plaza, Albany, New York 12257; or 65 Court Street, Room 7, Buffalo, New York 14202.

Sincerely yours,



Ryan Brauns

Examinier

cc: Wade, Clark, Mulcahy
111 Broadway
New York, NY 10006
Phone: 212 267 1900

10509192

TOTAL P.19



April 10, 2007

Certified Mail, Return Receipt Requested and Regular Mail

Wonder Works Construction Corp.
18 West 21st Street
New York, New York 10010

Re: Insured: Forthright Construction, Inc.
 Claimants: Vasilis and Constantia Aftousmis
 Claim No.: 0136NY041376
 Policy: L036000522 (11/24/03 – 11/24/04)
 L036001127 (11/24/04 – 11/24/05)
 L036001737 (11/24/05 – 11/24/06)

DECLINATION OF COVERAGE

Dear Sir/Madam:

American Claim Service is an authorized representative for Atlantic Casualty Insurance Company ("Atlantic Casualty") with respect to this matter.

Please accept this letter as Atlantic Casualty's statement of its position that, for the reasons set forth herein, there is **no coverage** for Wonder Works Construction Corp. ("Wonder Works") under the above-referenced insurance contracts for the action entitled *Vasilis Aftousmis and Constantia Aftousmis v. Wonder Works Construction Corp. and Forthright Construction, Inc.*, Index No. 102479/07, Supreme Court of the State of New York, County of New York, filed on February 22, 2007 (the "Aftousmis Action"). Among other things, the independent contractors / subcontractors exclusion and the claims in process exclusion bar coverage for this claim. Moreover, the failure to provide Atlantic Casualty with timely written notice breached the conditions precedent to coverage of the Atlantic Casualty insurance contracts, and the claim arises out of work performed at the project that was not within the business description as classified on the Atlantic Casualty insurance contracts. Therefore, Atlantic Casualty will not defend or indemnify Wonder Works with respect to the *Aftousmis Action*.

The Allegations Of The Aftousmis Action

P.O. Box 8010, Goldsboro, North Carolina 27533-8010
 Phone 919-759-3319 Toll Free 1-877-222-5522 Fax (919) 751-2502

Wonder Works Construction Corp.
April 10, 2007
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We understand that the allegations of the *Aftousmis Action* are unsubstantiated and, by addressing coverage issues herein, we do not mean to suggest that there is any merit to those claims.

The plaintiffs/claimants are Vasilis and Constantia Aftousmis. The defendants are Forthright Construction, Inc. and Wonder Works Construction Corp. ("Wonder Works"). On February 22, 2007, the claimants filed the *Aftousmis Action* against Forthright and Wonder Works as a result of alleged damage to plaintiffs' building. The *Aftousmis Action* alleges that the plaintiffs owned the premises located at 97 Quentin Road, Brooklyn, New York. It further alleges that Wonder Works was the construction manager and supervisor for a building adjoining the plaintiffs' premises. The excavation work for the building was allegedly done at a depth of "more than ten feet below the street line of 97 Quentin Road, Brooklyn, New York". (¶8) Moreover, the *Aftousmis Action* alleges that Wonder Works "wrongfully neglected to request permission to excavate" the soil beneath the plaintiffs' premises and failed to notify the plaintiffs of the excavation near to and underneath their premises. (¶10)

In addition, the *Aftousmis Action* alleges that Wonder Works wrongfully neglected to provide proper foundations to protect plaintiffs' walls and premises and ensure that they would be safe once excavation commenced. As a result of Wonder Works' negligence, the complaint alleges, the excavation caused cracks to develop in the walls and cement floor of the plaintiffs' premises. The complaint also alleges that Wonder Works' negligent supervision of the construction of the building caused debris to become lodged in the drains on the roof of plaintiffs' building, causing severe damage. The complaint alleges that Wonder Works breached its duty to properly oversee the excavation and construction of the project.

Further, the *Aftousmis Action* alleges that Forthright was the general contractor for the construction of the building adjacent to the plaintiffs' premises. The complaint goes on to make same allegations against Forthright that are alleged against Wonder Works. Finally, the complaint seeks \$10,000,000.00 in damages.

The Atlantic Casualty Insurance Contracts

Atlantic Casualty Insurance Company issued to Forthright Construction, Inc. of 2240 McDonald Avenue, Brooklyn, New York 11223, insurance contracts numbered L036000522, with a policy period of 11/24/03 – 11/24/04; L036001127, with a policy period of 11/24/04 – 11/24/05; and L036001737, with a policy period of 11/24/05 – 11/24/06 (the "Atlantic Casualty insurance contracts"). Each policy contains a limit of liability of \$1,000,000 per occurrence and \$2,000,000 aggregate.

SECTION III - LIMITS OF INSURANCE

1. *The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:*

Wonder Works Construction Corp.
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- a. *Insureds;*
- b. *Claims made or "suits" brought; or*
- c. *Persons or organizations making claims or bringing "suits".*

2. *The General Aggregate Limit is the most we will pay for the sum of:*

- a. *Medical expenses under Coverage C;*
- b. *Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and*
- c. *Damages under Coverage B.*

3. *The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".*

4. *Subject to 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal injury" and all "advertising injury" sustained by any one person or organization.*

5. *Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:*

- a. *Damages under Coverage A; and*
- b. *Medical expenses under Coverage C*

because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. *Subject to 5. above, the Fire Damage Limit is the most we will pay under Coverage A for damages because of "property damage" to premises, while rented to you or temporarily occupied by you with permission of the owner, arising out of any one fire.*

7. *Subject to 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.*

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

For your convenience, we quote certain portions of the Atlantic Casualty insurance contracts (without waiving Atlantic Casualty's right to rely on any other provision, each of which remains in full force and effect):

Wonder Works Construction Corp.
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SECTION I COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. *We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:*

- (1) *The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and*
- (2) *Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.*

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments Coverages A and B.

b. *This insurance applies to "bodily injury" and "property damage" only if:*

- (1) *The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";*
- (2) *The "bodily injury" or "property damage" occurs during the policy period; and*

2. Exclusions

This insurance does not apply to:

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) *That the insured would have in the absence of the contract or agreement; or*
- (2) *Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs*

Wonder Works Construction Corp.

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subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

- (a) *Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and*
- (b) *Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.*

j. Damage To Property

"Property damage" to:

- (1) *Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;*
- (2) *Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;*
- (3) *Property loaned to you;*
- (4) *Personal property in the care, custody or control of the insured;*
- (5) *That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or*
- (6) *That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.*

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III Limits Of Insurance.

Wonder Works Construction Corp.

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Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) *A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or*
- (2) *A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.*

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) *"Your product";*
- (2) *"Your work"; or*
- (3) *"Impaired property";*

Wonder Works Construction Corp.

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if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

* * *

SECTION IV COMMERCIAL GENERAL LIABILITY CONDITIONS

* * *

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

a. *You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:*

- (1) *How, when and where the "occurrence" or offense took place;*
- (2) *The names and addresses of any injured persons and witnesses; and*
- (3) *The nature and location of any injury or damage arising out of the "occurrence" or offense.*

b. *If a claim is made or "suit" is brought against any insured, you must:*

- (1) *Immediately record the specifics of the claim or "suit" and the date received; and*
- (2) *Notify us as soon as practicable.*

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. *You and any other involved insured must:*

- (1) *Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";*
- (2) *Authorize us to obtain records and other information;*
- (3) *Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and*
- (4) *Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.*

Wonder Works Construction Corp.

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d. *No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.*

* * *

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

(1) *Any of the other insurance, whether primary, excess, contingent or on any other basis:*

- (a) *That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";*
- (b) *That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;*
- (c) *That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or*
- (d) *If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I Coverage A Bodily Injury And Property Damage Liability.*

(2) *Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.*

Wonder Works Construction Corp.

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When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) *The total amount that all such other insurance would pay for the loss in the absence of this insurance; and*
- (2) *The total of all deductible and self-insured amounts under all that other insurance.*

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

6. Representations

By accepting this policy, you agree:

- a. *The statements in the Declarations are accurate and complete;*
- b. *Those statements are based upon representations you made to us; and*
- c. *We have issued this policy in reliance upon your representations.*

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. *As if each Named Insured were the only Named Insured; and*
- b. *Separately to each insured against whom claim is made or "suit" is brought.*

Wonder Works Construction Corp.

April 10, 2007

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SECTION V DEFINITIONS

8. *"Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:*
 - a. *It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or*
 - b. *You have failed to fulfill the terms of a contract or agreement; if such property can be restored to use by:*
 - a. *The repair, replacement, adjustment or removal of "your product" or "your work"; or*
 - b. *Your fulfilling the terms of the contract or agreement.*
9. *"Insured contract" means:*
 - a. *A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";*
 - b. *A sidetrack agreement;*
 - c. *Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;*
 - d. *An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;*
 - e. *An elevator maintenance agreement;*
 - f. *That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.*

Paragraph f. does not include that part of any contract or agreement:

- (1) *That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations.*

Wonder Works Construction Corp.

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within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

13. *"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.*

15. *"Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.*

16. *"Products-completed operations hazard":*

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or

Wonder Works Construction Corp.
April 10, 2007
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organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

- b. *Does not include "bodily injury" or "property damage" arising out of:*
 - (1) *The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;*
 - (2) *The existence of tools, uninstalled equipment or abandoned or unused materials; or*
 - (3) *Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.*

17. *"Property damage" means:*

- a. *Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or*
- b. *Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.*

21. *"Your product":*

- a. *Means:*
 - (1) *Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:*
 - (a) *You;*
 - (b) *Others trading under your name; or*
 - (c) *A person or organization whose business or assets you have acquired; and*
 - (2) *Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.*

Wonder Works Construction Corp.
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b. *Includes:*

- (1) *Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and*
- (2) *The providing of or failure to provide warnings or instructions.*

c. *Does not include vending machines or other property rented to or located for the use of others but not sold.*

22. *"Your work":*

a. *Means:*

- (1) *Work or operations performed by you or on your behalf; and*
- (2) *Materials, parts or equipment furnished in connection with such work or operations.*

b. *Includes:*

- (1) *Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and*
- (2) *The providing of or failure to provide warnings or instructions.*

* * *

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR
CONTRACTORS – SCHEDULED PERSON OR
ORGANIZATION**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART
SCHEDULE**

Name of Person or Organization:

WONDER WORKS CONSTRUCTION

Wonder Works Construction Corp.
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18 WEST 21ST STREET

NEW YORK, NY 10010

(if no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

- A. **Section II - Who Is An Insured** is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.
- B. With respect to the insurance afforded to these additional insureds, the following exclusion is added:

2. Exclusions

This insurance does not apply to "bodily injury" or "property damage" occurring after:

- (1) *All work, including material, parts or equipment furnished in connection with such work on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed; or*
- (2) *That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.*

EXCLUSIONS/LIMITATIONS - COMBINATION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

EXCLUSION - PUNITIVE DAMAGES

We do not cover any claim of or indemnification for punitive or exemplary damages. If a "suit" seeking both compensatory and punitive damages has been brought against you for a claim

Wonder Works Construction Corp.
April 10, 2007
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covered by this policy, we will provide defense for such action. We will not have any obligation to pay for any costs, interest or damage attributable to punitive or exemplary damages.

* * *

EXCLUSION - INDEPENDENT CONTRACTORS/SUBCONTRACTORS

You or any insured are not covered for claims, loss, costs or expense arising out of the actions of independent contractors/subcontractors for or on behalf of any insured.

* * *

EXCLUSION - SUBSIDENCE

In consideration of the premium charged, it is hereby understood and agreed that liability for bodily injury or property damage caused by, resulting from, attributable to or contributed to, or aggravated by the subsidence of land as a result of landslide, mud flow, earth sinking or shifting, resulting from operations of the Named Insured or any other subcontractor of the Named Insured is excluded.

* * *

EXCLUSION - ASSAULT AND/OR BATTERY

1. This insurance does not apply to and we have no duty to defend any claims or "suits" for "bodily injury" "property damage" or "personal and advertising injury" arising in whole or in part out of: ...

3. *Exclusion 2.a. of the Commercial General Liability Coverage Form is deleted in its entirety and replaced by the following:*
 - a) "bodily injury" or "property damage" expected or intended from the standpoint of any insured.

* * *

EXCLUSION - CLAIMS IN PROCESS

Paragraphs b. (3), c. and d. under Insuring Agreement of Section I - Coverage A - Bodily Injury and Property Damage Liability, are deleted. The following is added to 2. Exclusions under Section I - Coverage A - Bodily Injury and Property Damage Liability:

1. *any loss or claim for damages arising out of or related to "bodily injury" or "property damage", whether known or unknown:*
 - a. *which first occurred prior to the inception date of this policy; or*

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- b. *which is, or is alleged to be, in the process of occurring as of the inception date of this policy.*
- 2. *any loss or claim for damages arising out of or related to "bodily injury" or "property damage", whether known or unknown, which is in the process of settlement, adjustment or "suit" as of the inception date of this policy.*

We shall have no duty to defend any insured against any loss, claim, "suit" or other proceeding alleging damages arising out of or related to "bodily injury" or "property damage" to which this endorsement applies.

* * *

EXCLUSION – MOLD, BACTERIA, VIRUS AND ORGANIC PATHOGEN LIABILITY

The following supercedes the terms and conditions of this policy. This insurance does not apply.

- 1. *to any alleged "bodily injury", "property damage", "personal injury" or "advertising injury";*
- 2. *to any alleged damages for devaluation of property or for the taking, use or acquisition or interference with the rights of others in property or in air space;*
- 3. *to any loss, cost or expense, including but not limited to fines, penalties and attorney fees, arising out of any governmental direction or request, or any private party or citizen action, that an insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize "organic pathogens" or;*
- 4. *to any litigation or administration procedure in which an insured may be involved as a party;*

arising directly, indirectly, or in concurrence or in any sequence out of actual, alleged or threatened existence, exposure to, discharge, dispersal, release or escape of "organic pathogens", whether or not such actual, alleged or threatened existence, discharge, dispersal, release or escape is sudden, accidental or gradual in nature.

In addition, this insurance does not apply to any alleged "bodily injury", "property damage", "personal injury" or "advertising injury", loss, cost or expense including but not limited to fines, penalties and attorney fees, arising out of or related to any form of "organic pathogens", whether or not such actual, alleged or threatened existence, exposure to, discharge, dispersal, release or escape is negligently or in intentionally caused by any person or entity and whether or not the liability of any insured is alleged to be direct or vicarious. This exclusion also applies whether or not such injury, damage, devaluation, cost or expense is expected or intended from the standpoint of any insured.

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"Organic pathogen" means any organic irritant or contaminant, including but not limited to mold, fungus, bacteria or virus, including but not limited to their byproducts such as mycotoxin, mildew, or biogenic aerosol.

"Waste" means any property intended to be disposed, recycled, reused or reclaimed by the owner or user thereof.¹

All other terms and conditions remain unchanged.

* * *

LIMITATION – DUTY TO DEFEND

Where there is no coverage under this policy, there is no duty to defend any insured.

* * *

TOTAL POLLUTION EXCLUSION ENDORSEMENT

Exclusion f. under paragraph 2., **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

This insurance does not apply to.

f. Pollution

- (1) "Bodily injury" or "property damage" which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
- (2) Any loss, cost or expense arising out of any:
 - (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
 - (b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

The Definition of "Pollutants" in Section V – Definitions is deleted and replaced by the following:

"Pollutants" means solid, liquid, gaseous, or thermal irritant or contaminant or all material for which a Material Safety Data Sheet is required pursuant to federal, state or

¹ This paragraph was removed from the endorsement in the 2005-2006 policy only.

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*local laws, where ever discharged, dispersed, seeping, migrating or released, including onto or into the air or any air supply, water or any water supply or land, including but not limited to petroleum, oil, heating oil, gasoline, fuel oil, carbon monoxide, industrial waste, acid, alkalis, chemicals, waste, sewage; and associated smoke, vapor, soot and fumes from said substance. Waste includes material to be recycled, reconditioned, or reclaimed.*²

* * *

Atlantic Casualty insurance contract number L036001737 (11/24/05-06) also contains the following provisions:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CLASSIFICATION LIMITATION

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to and no duty to defend is provided for "bodily injury", "property damage", "personal and advertising injury" or medical payments for operations which are not classified or shown on the Commercial General Liability Coverage Declarations, its endorsements or supplements.

* * *

Atlantic Casualty insurance contracts numbered L036000522 (11/24/03-04), L036081127 (11/24/04-05) and L036001737 (11/25/05-06) contain the following provisions:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SUBCONTRACTORS – DEFINITION OF ADEQUATELY INSURED

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The classifications used in this policy containing the words "Contractors – Subcontracted Work" apply to that portion of the operations performed for the insured by "adequately insured" subcontractors.

This insurance does not apply to any claim arising from subcontracted work unless:

² This paragraph is only contained in the Total Pollution Exclusion Endorsement in the 2005-2006 policy.

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1. *The subcontractor maintains insurance in force for his operations with at least the following Limits of Liability:*

A. *General Aggregate Limit*

<i>(Other than Products -Completed Operations)</i>	<i>\$1,000,000</i>
<i>Products-Completed Operations Aggregate Limit</i>	<i>\$1,000,000</i>
<i>Each Occurrence Limit</i>	<i>\$1,000,000</i>

B. *Or the limits provided by this policy, whichever are less; and*

2. *You maintain a current certificate of insurance for the subcontractor; and*
3. *A hold harmless agreement in favor of you has been executed with the subcontractor; and/or*
4. *You are endorsed to the subcontractors Commercial General Liability policy as an additional insured.*

*If all of the above conditions are met, the subcontractor will be considered "adequately insured" and exclusion **AGL-005** Exclusion-Independent Contractors/Subcontractors shown on the Exclusions/Limitations-Combination Endorsement attached to this policy is deleted in its entirely.*

All other terms and conditions remain unchanged.

* * *

Atlantic Casualty's Denial of Coverage

There is **no coverage** for Wonder Works for the *Aftousmis Action* based on all of the terms of the insurance contract and the following:

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that Wonder Works is not an insured or additional under the Atlantic Casualty insurance contract and/or on the grounds and to the extent that any limitation in any additional insured coverage applies.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that the Exclusion -- Independent Contractors/Subcontractors applies.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that the Exclusion – Subsidence applies

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that the *Aftousmis Action* alleges damage arising out of work performed at the project that was not within the business description as classified or shown on the Atlantic

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Casualty insurance contracts and/or on the grounds that the Classification Limitation endorsement in the Atlantic Casualty insurance contracts applies.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that the Exclusion – Claims In Process applies.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that there was any misrepresentation, misstatement, omission, and/or failure to disclose during the procurement of the Atlantic Casualty insurance contracts.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that there has been a breach of the conditions precedent to coverage in the Atlantic Casualty insurance contracts, including the failure to provide timely written notice of occurrence, claim and suit, immediately forward documents, cooperate, and not make voluntary payments or admit any liability. Atlantic Casualty does not provide coverage where there has been a failure to comply with the insurance contracts' notice and other conditions.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that the *Aftousmis Action* does not assert a claim for “property damage” ... caused by an ‘occurrence’” within the meaning of the Atlantic Casualty insurance contracts. There is no coverage for injury or damage that is not caused by an “occurrence.”

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that the Atlantic Casualty insurance contracts are not triggered by this claim and to the extent that there is no covered “property damage” during the Atlantic Casualty insurance contracts’ policy periods. The Atlantic Casualty insurance contracts’ policy periods are 11/24/03-04, 11/24/04-05, and 11/24/05-06. No injury or damage outside those periods is covered by Atlantic Casualty.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that the Exclusion – Expected or intended from the standpoint of the insured applies.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that exclusions j, k, l, m, and/or n applies.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that the total pollution exclusion applies.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that the “Mold, Fungus, Bacteria, Virus And Organic Pathogen Exclusion – Liability” applies.

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Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that anyone seeks coverage for an award of punitive damages. Such damages are barred from coverage based on the Exclusion – Punitive Damages and New York law.

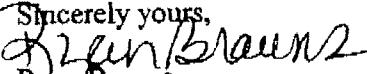
Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that anyone has, for any losses allegedly covered by the Atlantic Casualty insurance contracts, co-insurance, other insurance, self-insurance, deductibles, retentions, collateral sources of money, or other contractual indemnitors or to the extent the Atlantic Casualty insurance contracts provide limited or no insurance based on an allocation or to the extent that the Atlantic Casualty insurance contracts constitute excess insurance.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that the *Aftousmis Action* does not seek sums you are legally obligated to pay as damages within the meaning of the Atlantic Casualty insurance contracts.

Atlantic Casualty denies coverage to Wonder Works for the *Aftousmis Action* on the grounds and to the extent that any deductible or retention applies or any award exceeds the limits of the Atlantic Casualty insurance contracts.

This letter is based on the information supplied to Atlantic Casualty as of this date. It is not, and should not be construed as, a waiver or estoppel of Atlantic Casualty's rights or any of the terms, conditions, and exclusions of the captioned Atlantic Casualty insurance contracts, which remain in full force and effect. Atlantic Casualty expressly reserves the right to assert any defenses determined to exist from orders, facts, pleadings, discovery, investigation or other disclosure.

Should you wish to take this matter up with the New York State Insurance Department, you may write or visit the Consumer Credit Services Bureau, New York State Insurance Department at 160 West Broadway (19th Floor), New York, New York 10013; Agency Building One, Nelson A. Rockefeller Plaza, Albany, New York 12257; or 65 Court Street, Room 7, Buffalo, New York 14202.

Sincerely yours,

Ryan Brauns

Examiner

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